

The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

BRUCE CORKER d/b/a RANCHO ALOHA;
COLEHOUR BONDERA and MELANIE
BONDERA, husband and wife d/b/a
KANALANI OHANA FARM; and ROBERT
SMITH and CECELIA SMITH, husband and
wife d/b/a SMITHFARMS, on behalf of
themselves and others similarly situated,

Plaintiffs,

COSTCO WHOLESALE CORPORATION, a Washington corporation; AMAZON.COM, INC., a Delaware corporation; HAWAIIAN ISLES KONA COFFEE, LTD., LLC, a Hawaiian limited liability company; COST PLUS/WORLD MARKET, a subsidiary of BED BATH & BEYOND, a New York corporation; BCC ASSETS, LLC d/b/a BOYER'S COFFEE COMPANY, INC., a Colorado corporation; JAVA LLC, a Michigan limited liability company; MULVADI CORPORATION, a Hawaii corporation; COPPER MOON COFFEE, LLC, an Indiana limited liability company; GOLD COFFEE ROASTERS, INC., a Florida corporation; CAMERON'S COFFEE AND DISTRIBUTION COMPANY, a Minnesota corporation; PACIFIC COFFEE, INC., a Hawaii corporation; THE KROGER

Case No. 2:19-cv-00290-RSL

**STIPULATED MOTION FOR ENTRY
OF PROTOCOL FOR THE
PRODUCTION OF ELECTRONICALLY
STORED INFORMATION (“ESI”)**

1 CO., an Ohio corporation; WALMART INC.,
2 a Delaware corporation; BED BATH &
3 BEYOND INC., a New York corporation;
4 ALBERTSONS COMPANIES INC., a
5 Delaware Corporation; SAFEWAY INC., a
6 Delaware Corporation; MNS LTD., a Hawaii
7 Corporation; MARMAXX OPERATING
8 CORP. d/b/a T.J. MAXX and MARSHALLS,
9 a Delaware corporation; SPROUTS
10 FARMERS MARKET, INC. a Delaware
corporation,

11 Defendants.

12 The parties¹ hereby stipulate to the following provisions regarding the discovery of
13 electronically stored information (“ESI”) in this matter:

14 **A. General Principles**

15 1. An attorney’s zealous representation of a client is not compromised by conducting
16 discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate
17 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and
18 contributes to the risk of sanctions.
19

20 2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied
in each case when formulating a discovery plan. To further the application of the proportionality
standard in discovery, requests for production of ESI and related responses should be reasonably
targeted, clear, and as specific as possible.

21 **B. ESI Disclosures**

22 Within 14 days² after the entry of this Order or November 14, 2019, whichever is sooner, each

23 ¹ The “parties” and “defendants” include all parties to this case and defendants, except
for BCC Assets, LLC d/b/a Boyer’s Coffee Company, Inc.

24 ² Except for (1) Kroger, who will have 30 days after the entry of this Order or December
2, 2019, whichever is sooner, to disclose the information required in Section B for its Harris
25 Teeter brand; (2) Albertsons and Safeway who will have until December 9, 2019 to disclose the
information required in Section B; and (3) Amazon, who has 30 days after the entry of this Order
26 or December 2, 2019, whichever is sooner, to disclose the information required in Section B.

1 party shall disclose:

2 1. Custodians. Plaintiffs and distributor defendants shall disclose up to 5 custodians,
3 retailer defendants (including those with at-issue private label products) shall disclose up to 7
4 custodians. The parties shall meet and confer if either party believes additional custodians would
5 be proportionate to the needs of the litigation. See Fed. R. Civ. P. 26(b)(1). The parties make no
6 further representations or agreements regarding custodians and whether or not they should be
7 limited or expanded. This stipulated ESI order does not create a presumptive limit on custodians
8 for any party.

9 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared drives,
10 servers, etc.), if any, likely to contain discoverable ESI.

11 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
12 contain discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud”
13 storage, etc.) and, for each such source, the extent to which a party is (or is not) able to
14 preserve information stored in the third-party data source.

15 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
16 (by type, date, custodian, electronic system or other criteria sufficient to specifically
17 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.
18 P. 26(b)(2)(B).

19 **C. Preservation of ESI**

20 The parties acknowledge that they have a common law obligation to take reasonable and
21 proportional steps to preserve discoverable information in the party’s possession, custody or
22 control. With respect to preservation of ESI, the parties agree as follows:

23 1. Absent a showing of good cause by the requesting party, the parties shall not be
24 required to modify the procedures used by them in the ordinary course of business to back-up
25 and archive data; provided, however, that the parties shall preserve all discoverable ESI in
26 their possession, custody or control.

1 2. All parties shall supplement their disclosures in accordance with Rule 26(e) with
2 discoverable ESI responsive to a particular discovery request or mandatory disclosure where
3 that data is created after a disclosure or response is made (unless excluded under (C)(3) or
4 (D)(1)-(2) below).

5 3. Absent a showing of good cause by the requesting party, the following categories of
6 ESI need not be preserved:

- 7 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 8 b. Random access memory (RAM), temporary files, or other ephemeral data
that are difficult to preserve without disabling the operating system.
- 9 c. On-line access data such as temporary internet files, history, cache, cookies, and
the like.
- 10 d. Data in metadata fields that are frequently updated automatically, such as last-
opened dates (see also Section (E)(5)).
- 11 e. Back-up data that are substantially duplicative of data that are more
accessible elsewhere.
- 12 f. Server, system or network logs.
- 13 g. Data remaining from systems no longer in use that is unintelligible on the systems
in use.
- 14 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from
mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided
that a copy of all such electronic data is routinely saved elsewhere (such as on a
server, laptop, desktop computer, or “cloud” storage).

15 **D. Privilege**

16 1. With respect to privileged or work-product information generated after the filing of the
complaint, parties are not required to include any such information in privilege logs.

17 2. Activities undertaken in compliance with the duty to preserve information are protected
from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

18 3. The production of privileged or work-product protected documents, electronically stored
information ("ESI") or information is not a waiver of the privilege or protection from discovery
in this case or in any other federal or state proceeding. This Order shall be interpreted to provide
the maximum protection allowed by Federal Rule of Evidence 502(d). Nothing contained herein

1 is intended to or shall serve to limit a party's right to conduct a review of documents, ESI, or
2 information (including metadata) for relevance, responsiveness, and/or segregation of privileged
3 and/or protected information before production.

4 4. Information produced in discovery that is protected as privileged or work product shall
5 be immediately returned to the producing party, and its production shall not constitute a waiver
6 of such protection, if: (i) such information appears on its face to have been inadvertently
7 produced or (ii) the producing party provides notice within 15 days of discovery by
8 the producing party of the inadvertent production.

9 5. **Privilege Log Based on Metadata.** The parties agree that privilege logs shall
10 include a unique identification number for each document and the basis for the claim (attorney-
11 client privileged or work-product protection). For ESI, the privilege log may be generated
12 using available metadata, including author/recipient or to/from/cc/bcc names; the subject matter
13 or title and date created. Should the available metadata provide insufficient information for the
14 purpose of evaluating the privilege claim asserted, the producing party shall include such
15 additional information as required by the Federal Rules of Civil Procedure.

16 **E. ESI Discovery Procedures**

17 1. On-site inspection of electronic media. Such an inspection shall not be permitted
18 absent a demonstration by the requesting party of specific need and good cause or by
19 agreement of the parties.

20 2. Search methodology. The Parties will meet and confer in good faith to determine
21 how each of them will review ESI from such custodians (e.g., predictive coding, search terms).
22 Should the parties employ search terms, in the absence of agreement on appropriate search
23 terms, the following procedures shall apply:

24 a. A producing party shall disclose the search terms or queries, if any, and
25 methodology that it proposes to use to locate ESI likely to contain discoverable information. The
26 parties shall meet and confer to attempt to reach an agreement on the producing party's search

1 terms and/or other methodology.

2 b. If search terms or queries are used to locate ESI likely to contain discoverable
3 information, a requesting party is entitled to no more than 5 additional terms or queries to be
4 used in connection with further electronic searches absent a showing of good cause or
5 agreement of the parties. The 5 additional terms or queries, if any, must be provided by the
6 requesting party within 14 days of receipt of the producing party's production.

7 c. Focused terms and queries should be employed; broad terms or queries, such
8 as product and company names, generally should be avoided. Absent a showing of good cause,
9 each search term or query returning more than 250 megabytes of data is presumed to be
10 overbroad, excluding Microsoft PowerPoint files, image and audio files, databases, and similarly
11 large file types.

12 d. The producing party shall search both non-custodial data sources and ESI
13 maintained by the custodians identified above.

14 3. Format. The Parties shall generally produce ESI that is responsive, not
15 privileged, and not work product, in electronic format as a Bates numbered single-page TIFF
16 image. The production of documents requiring color shall be made in single page JPEG format
17 that provides sufficient quality for the review of these documents and/or ESI to the extent
18 reasonably possible. All production items will be provided with a delimited data file or "load
19 file." Acceptable formats for the load file are .log, .opt, .dii .lfp, .txt, .dat, or .csv. Each party
20 will designate its preferred load file format and provide specific details regarding the
21 structure/format of the preferred load file. The load file must reference each TIFF in the
22 corresponding production. The total number of documents referenced in a production's data
23 load file should match the total number of designated document breaks in the Image Load files
24 in the production. Each deliverable volume should limit directory contents to approximately
25 1000 files per folder. Unless otherwise agreed to by the parties, files that are not easily
26 converted to or reviewable in image format, such as spreadsheet, database, drawing and

1 audio/video files, should be produced in native format. Documents produced natively shall be
2 represented in the set of imaged documents by a slip sheet indicating the production
3 identification number and confidentiality designation for the native file that is being produced

4 4. Document Unitization. Emails and related attachments will be produced such that
5 their parent-child or family relationship is maintained. If the only responsive document in a
6 family is entirely privileged, then the non-responsive documents in that family need not be
7 produced. If an email contains attachments, each attachment should be produced sequentially
8 following the email. When emails are converted to TIFF for production, they should be imaged
9 in a manner that displays the following headers: (i) the sender, (ii) the recipient(s), (iii) the
10 carbon-copy recipients (“CCs”), (iv) the blind-copy recipients (“BCCs”), if available, (v) the
11 date and time the email was sent, and (vi) the subject of the email. The Parties will attempt in
12 good faith to unitize documents correctly.

13 5. Electronic Production of Physical Documents. Whenever practicable, documents
14 that are located solely in physical hardcopy format are to be scanned and produced as text-
15 searchable TIFF or PDF files in lieu of photocopy production in their physical form.

16 6. Databases. Databases may contain substantial information that is not relevant or
17 responsive. Thus, a Party may opt to produce relevant and responsive information from
18 databases in an alternate, static format, such as a report or data table, and these reports or data
19 tables may be used by the Parties (including as evidence in support of a motion or at trial) in lieu
20 of, and without production of, the original database. Should a Party opt to produce such
21 information as a report/data table, any report/data table that is produced will be deemed
22 authentic and an accurate representation of information included in the counterpart database. A
23 Party that withholds any part of a database as non-responsive to a request for production should
24 not later be permitted to rely on the withheld information in the event that such information was
25 responsive to the request absent good cause or lack of prejudice to the receiving party.

26 7. De-duplication. A Party is only required to produce a single copy of a

1 responsive document (provided that all custodians are identified in an “All Custodian” or other
2 metadata field). Parties may de-duplicate stand-alone documents or entire document families
3 globally using MD5 or SHA-1 Hash⁵ value matching. A Party is only required to produce the
4 inclusive email(s) in an email chain, including any associated attachments. Attachments for
5 each inclusive e-mail shall be produced in accordance with the terms of Paragraph 5 above.
6 Parties may remove relevant, non-inclusive emails from production consideration provided the
7 excluded content is included in an inclusive email within the production set or designated on the
8 privilege log. Any email that changes recipients shall be identified as inclusive and shall be
9 produced if relevant and not privileged. Common system files defined by the NIST library
10 (<http://www.nsrl.nist.gov/>) need not be produced. To the extent the Parties de-duplicate stand-
11 alone electronic documents against an email attachment, the attachment to the email must be the
12 document that is produced.

13 8. Metadata fields. If the requesting party seeks metadata, the parties agree that
14 only the following metadata fields need be produced: document type; custodian and duplicate
15 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file
16 path; date and time created, sent, modified and/or received; and hash value.

17 **F. Federal Rules**

18 The parties agree that discovery must be conducted in furtherance of the Federal Rules.
19 Accordingly, this Protocol should be interpreted to further the just, speedy, and inexpensive
20 resolution of this action. Fed. R. Civ. P. 1.

21 **G. Resolution of Disputes**

22 The Parties shall meet and confer in good faith to resolve any dispute arising in regard to
23 ESI and/or any condition or term of this Protocol, and, to the extent possible, shall resolve any
24 such disputes without involving the Court.

25

26

1 Dated: October 31, 2019

2 Respectfully submitted,

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ORDER

Based on the foregoing, IT IS SO ORDERED.

Dated this 1st day of November, 2019.

Mrs Casnik

Robert S. Lasnik

United States District Judge